

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA
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BRIEF AND APPENDIX FOR APPELLANTS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8199

927

THE DISTRICT OF COLUMBIA AND J. RUSSELL
YOUNG, GUY MASON, CHARLES W. KUTZ,
Commissioners of the District of Columbia,

Appellants,

v.

AMERICAN PHARMACEUTICAL ASSOCIATION,

Appellee.

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No. 8199

THE DISTRICT OF COLUMBIA AND J. RUSSELL
YOUNG, GUY MASON, CHARLES W. KUTZ,
Commissioners of the District of Columbia,
Appellants,

v.

AMERICAN PHARMACEUTICAL ASSOCIATION,
Appellee.

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This action was brought by the appellee by the filing in the United States District Court for the District of Columbia of a complaint and petition for declaratory judgment. Appellants motion to dismiss the complaint and petition was overruled on February 10, 1942, and an order to that effect was entered on February 12, 1942. On February 14, 1942, the appellants filed a notice of intention to apply for allowance of a special appeal to this Court from the aforesaid order. The said petition for special appeal was filed on March 9, 1942, and was

granted by order of this Court dated March 30, 1942, under the provisions of Sec. 17-101, D. C. Code, 1940 edition, and Rule 11 of General Rules of this Court as amended March 13, 1941.

STATEMENT OF THE CASE

Appellee is the owner of certain real estate situated on Constitution Avenue in the District of Columbia. Said property has enjoyed exemption from taxation since January 1, 1934. On February 10, 1941, the appellee was advised that the Commissioners, D. C., had considered and concluded that said property was not legally exempt from taxation under existing law and that the assessor would be directed to restore said property to a taxable status at the expiration of sixty days from the date of said notice. On April 7, 1941, appellee filed a protest against the proposed action of the Commissioners and thereafter, on June 18, 1941, filed a memorandum in support thereof. On November 12, 1941, appellee was advised that the Commissioners had affirmed their prior opinion regarding the taxable status of appellee's real property and on December 12, 1941, the assessor mailed to the appellee bills for taxes on its aforesaid property for the period April 11, 1941, to June 30, 1941, and for the fiscal year ending June 30, 1942.

On December 26, 1941, appellee filed in the United States District Court for the District of Columbia a complaint and petition for declaratory judgment (appellants' appendix 1a). Appellants filed a motion to dismiss the complaint and petition (appellants' appendix 6a), which motion was overruled by an order dated February 12, 1942 (appellants' appendix 6a). No written opinion was filed by the trial justice.

STATUTES INVOLVED

The Federal Declaratory Judgments Act of June 14, 1934, as amended August 30, 1935, 28 U. S. C. A. 400, provides that:

“(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

Section 10, Title IX of the Act to amend the District of Columbia Revenue Act of 1937, approved May 16, 1938 (52 Stat. 375, Section 47-2410, D. C. Code, 1940 edition), provides that:

“No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees, of any tax.”

Title IX of the Act to amend the District of Columbia Revenue Act of 1937, approved May 16, 1938 (52 Stat. 370, Sec. 47-2401-12, D. C. Code, 1940 edition), established a Board of Tax Appeals for the District of Columbia. Section 5(d) of Title IX provides as follows (Sec. 47-712, and Sec. 47-2405, D. C. Code, 1940 edition):

“If the board of assistant assessors shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment was void, it shall be their duty at once to reassess this property for each and every year for which it has escaped assessment and taxation, and report the same, through the assessor, to the collector of taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected: *Provided*, That no property which has escaped assessment and taxation shall be liable under this section for a period of more than three years prior to such assessment, except in the

case of property involved in litigation. In addition to the duties of the assessor hereinbefore provided, it shall be the duty of the assessor upon reassessment as herein provided to notify the taxpayer by writing of the fact of such reassessment. Any person aggrieved by any reassessment made in pursuance of this paragraph, may within ninety days after notice of this reassessment, appeal from said reassessment in the same manner and to the same extent as provided in sections 3 and 4 of this title."

Section 3 of Title IX provides:

"Any person aggrieved by any assessment by the District against him of any * * * tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the Board provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing. * * *."

Section 4 of Title IX provides that the decision of the Board may be reviewed by the United States Court of Appeals for the District of Columbia upon petition by either the District of Columbia or the taxpayer.

STATEMENT OF POINTS

1. The granting of declaratory relief in this case is prohibited by statute.
2. Declaratory relief should be denied in this case for the reason that Congress has provided a special statutory remedy in such cases.

SUMMARY OF ARGUMENT

1. The statute specifically prohibits the filing of a suit to enjoin the assessment or collection of taxes by the District of

Columbia. The granting of a declaratory judgment in favor of the appellee would amount to the granting of an injunction. The Federal Declaratory Judgments Act does not add to the jurisdiction of the Federal courts nor create any new substantive right, and interference with the established procedure for the collection of District taxes should not be permitted under this Act to any greater extent than is permitted under the power of the District Court to enjoin the collection of such taxes.

2. Congress has provided an adequate judicial remedy, specifically devised to hear and determine complaints against taxes assessed by the District of Columbia. The granting of declaratory relief in such cases would amount to ousting the Board of Tax Appeals of its jurisdiction, and it was not intended that a declaration should be employed for such a purpose.

ARGUMENT

I

The granting of declaratory relief in this case is prohibited by statute.

The granting of a declaratory judgment in favor of the appellee would amount to the granting of an injunction. *Collier Advertising Service v. City of New York*, 32 F. Sup. 870. Section 10, Title IX of the Act of May 16, 1938 (52 Stat. 375), Section 47-2410, D. C. Code, 1940 edition, provides that:

“No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees, of any tax.”

Even in the absence of any statutory provision, the courts in this jurisdiction have uniformly refused to enjoin the collection of taxes levied by the District of Columbia.

Burgdorf v. District of Columbia, 7 App. D. C. 405, 416;

United States Trust Company v. District of Columbia, 48 App. D. C. 610;

Maryland and Virginia Milk Producers' Association, Inc. v. Hazen, 66 App. D. C. 136, 85 F. (2d) 302, Cert. den. 57 S. Ct. 29.

In refusing to restrain the collection of taxes and holding that the remedy of the taxpayer was to pay the tax and to sue for the recovery of the amount paid, this Court in the last two above-cited cases adopted the rule stated by the Supreme Court in *Dows v. Chicago*, 11 Wall. 108, 110, 20 L. Ed. 65, 66, as follows:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

The reasons for denying injunction in tax cases are equally applicable to cases seeking judgments declaratory of a taxpayer's liability. The Federal Declaratory Judgments Act does not add to the jurisdiction of the Federal courts nor create any new substantive right, and interference with the established procedure for the collection of District taxes should not be permitted under this Act to any greater extent than is or has been permitted under the power of the District Court to enjoin the collection of such taxes. See *Utah Fuel Company v. Bituminous Coal Commission*, 59 App. D. C. 33, 101 F. (2d) 426, affirmed 306 U. S. 56, wherein this Court quoted the following from *Bradley Lumber Company v. National*

Labor Relations Board, 84 F. (2d) 97, 100, cert. den. 299 U. S. 559:

"* * * The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin. * * *"

See also *Washington Terminal Co. v. Boswell*, --- App. D. C. ---, 124 F. (2d) 235, wherein this Court states (p. 251):

"* * * The declaratory action has much of equitable quality in regard to the discretion which should be exercised in allowing relief. Its effect here, if plaintiff should be successful, would be substantially the same as setting aside the award or enjoining enforcement."

The *Collier Advertising* case, *supra*, is directly in point. The plaintiff in that case sought a declaratory judgment as to its liability under the Sales Tax Law enacted by the City of New York. The defendants made a motion to dismiss the suit on the ground that the district court had no jurisdiction under the terms of the Johnson Act, 28 U. S. C. A., Section 41, Subdivision 1, which provides that:

"* * * no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

In sustaining the motion to dismiss the court stated (p. 872):

"* * * The Federal Declaratory Judgment Statute, 28 U. S. C. A. Section 400, makes it clear that the

right to the declaration sought is entirely independent of the right to any further relief based on the declaration, which would include the injunction asked in this case. The question persists whether or not the ban of the Johnson Act includes suit for a declaration where injunction is an unnecessary relief. We think that the action for declaration is within the ban. The Johnson Act does not concern itself with any distinctions between causes of action or particular forms of relief. It denies jurisdiction to the District Court of suits to enjoin, suspend or restrain assessment and collection of State taxes. *It would be disingenuous to deny that a declaration of the plaintiff's claimed rights in this action would secure any other results than to enjoin, suspend and restrain the operation of the Sales Tax Law upon its business. Any other holding would substantially nullify the Johnson Act.* The declaration is an adjudication; not an abstraction. It was observed, in *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 287 N. Y. S. 288, that a natural presumption expects public officials to respect the Court's declaration and to follow its interpretation of the law. Such voluntary submission averts the need of an injunction but accomplishes precisely the same result. We might reject jurisdiction in the exercise of our discretion. *Zenie v. Mis-kind*, D. C., 10 F. Supp. 779; *American Automobile Ins. Co. v. Freundt*, 7 Cir., 103 F. 2d 613. But, *we think a fair interpretation of the Johnson Act requires that the defendant's motion be granted as a matter of law.*" (Emphasis supplied.)

The court found that the taxpayer had a plain, speedy, and efficient remedy in the New York court and held that it therefore was prohibited by the Johnson Act from granting declaratory relief. The Act of Congress prohibiting suits to enjoin the assessment and collection of District taxes does not contain the limitation found in the Johnson Act. There is, however, a plain, speedy, and efficient remedy for the re-

covery by the taxpayer of taxes erroneously collected by the District.

In opposition to the District's motion to dismiss the complaint and petition the appellee relied upon the case of *Morrison-Knudsen v. The Board of Equalization*, 35 F. Supp. 553. In this case the district court of Wyoming granted declaratory relief only for the reason that the Wyoming laws provided no remedy to the taxpayer. For the same reason the granting of injunction in that case would not have been prohibited by the Johnson Act. Furthermore, the plaintiff in the *Morrison-Knudsen* case, *supra*, was attacking the constitutionality of the taxing act. While declaratory relief has been granted in this and other cases involving the constitutionality of taxing statutes, it is held that where the question is as to the liability of an individual taxpayer he is not entitled to invoke the declaratory judgments statute where he has another adequate remedy.

Collier Advertising Service v. New York, *supra*;
Lisbon Village Dist. v. Lisbon, 85 N. H. 183, 155 A. 252;
Manufacturers National Bank v. Detroit, 285 Mich. 273,
 280 N. W. 760;
City of Erie v. Phillips, 323 Pa. 557, 187 A. 203;
Petition of Malick, 133 Pa. Super. Ct., 1 A. (2d) 550;
Ottawa Y. M. C. A. v. Ottawa, 29 Ont. L. Rep. 574;
Commercial Credit Company v. Martin, 275 Ky. 548,
 122 S. W. (2d) 135.

II

Declaratory relief should be denied in this case for the reason that Congress has provided a special statutory remedy in such cases.

Title IX of the Act to amend the District of Columbia Revenue Act of 1937, approved May 16, 1938 (52 Stat. 379, Sec. 47-2401-12, D. C. Code, 1940 edition), established a Board of Tax Appeals for the District of Columbia. Section

5(d) of Title IX provides as follows (Sec. 47-712, and Sec. 47-2405, D. C. Code, 1940 edition):

"If the board of assistant assessors shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment was void, it shall be their duty at once to reassess this property for each and every year for which it has escaped assessment and taxation, and report the same, through the assessor, to the collector of taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected: *Provided*, That no property which has escaped assessment and taxation shall be liable under this section for a period of more than three years prior to such assessment, except in the case of property involved in litigation. In addition to the duties of the assessor hereinbefore provided, it shall be the duty of the assessor upon reassessment as herein provided to notify the taxpayer by writing of the fact of such reassessment. Any person aggrieved by any reassessment made in pursuance of this paragraph, may within ninety days after notice of said reassessment, appeal from said reassessment in the same manner and to the same extent as provided in sections 3 and 4 of this title."

Section 3 of Title IX provides:

"Any person aggrieved by any assessment by the District against him of any * * * tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the Board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing. * * *."

Section 4 of Title IX provides that the decision of the Board may be reviewed by this Court upon petition by either

the District of Columbia or the taxpayer.

Thus Congress has provided an adequate judicial remedy, specifically devised for the particular situation here presented. In sustaining the denial of declaratory relief in such cases, this Court, in the case of *Washington Terminal Co. v. Boswell*, *supra*, stated (p. 251):

“* * * The declaratory action has much of equitable quality in regard to the discretion which should be exercised in allowing relief. *Its effect here, if plaintiff should be successful, would be substantially the same as setting aside the award or enjoining enforcement.* Consequently, we can see no valid reason for excluding these remedies which does not apply with equal force to that by declaratory judgment, whether as a matter of Congressional intent or one of judicial discretion in allowing that relief. To allow it also would deprive the employee of his special advantages in litigation. *It would displace another, and in our view, an adequate judicial remedy specially devised for the particular situation. When this is the effect, courts generally deny declaratory relief.* The doctrine of ‘primary jurisdiction’ (See Note [1938] 51 Harv. L. Rev. 1251) and considerations of comity toward a specialized administrative tribunal charged to deal with such matters lend weight to the view that it should be denied in these circumstances. The former has been applied most frequently when the administrative body has exclusive jurisdiction, or where exhaustion of the administrative remedy is required, to prevent the suit from being premature or to give the court the benefit of the administrative judgment in advance of its own action. * * *.” (Emphasis supplied.)

Professor Borchard in his work on Declaratory Judgments states (p. 109):

“* * * the court will refuse a declaration where another court has jurisdiction of the issue, where a

proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. In these cases it is neither necessary nor proper to issue the declaration. * * *."

It is obvious that even in the absence of the express statutory prohibition against enjoining the collection of taxes the lower court would have been without jurisdiction to grant an injunction in this case, and, as before pointed out, if an injunction cannot be granted, neither can a declaratory judgment. Congress has provided that the action of the assessor in assessing property may be reviewed by two designated tribunals—the Board of Tax Appeals and this Court. What the appellee seeks in this case is a review by an entirely different tribunal—the District Court of the United States for the District of Columbia. The case of *Sykes v. Jenny Wren Co.*, 64 App. D. C. 379, 73 F. (2d) 729, cert. den. 296 U. S. 624, presented a question similar to that here involved. In holding that the statutory remedy providing for appeal from a decision of the Federal Communications Commission to this Court was exclusive this Court said (p. 382):

"* * * the remedy by appeal provided by section 402 (b) of the Communications Act of 1934, supra, was the exclusive remedy provided by statute for the review of plaintiffs' complaint. We think accordingly that the lower court was without jurisdiction over the cause of action asserted by plaintiff in the case brought by it for an injunction. *White v. Federal Radio Commission* (D. C.) 29 F. (2d) 113; *American Bond & Mortgage Company v. United States* (C. C. A.) 52 F. (2d) 318; *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627, 636, 77 L. Ed. 1166, 89 A. L. R. 406."

See also: *Black River Valley Broadcasts v. McNinch*, 69 App. D. C. 311, 101 F. (2d) 235, cert. den. 307 U. S. 623.

The case of *Williams v. Tawes*, ----- Md.-----, 17 A. (2d) 137, is directly in point. The plaintiff in the Williams case contended that she was not taxable under certain provisions of the Maryland income tax law (Chap. 277 of the Acts of 1939, Maryland Code, Article 81, Secs. 240-253). Accordingly, under the provisions of Chapter 294 of the Acts of 1939, Code, Art. 31A, known as the Uniform Declaratory Judgments Act, she filed her bill of complaint in the Circuit Court for Anne Arundel County, seeking a declaration as to her tax status. The defendants demurred to the bill of complaint, principally upon the ground that it stated no facts entitling plaintiff to relief under the Uniform Declaratory Judgments Act. The demurrers were overruled by the Chancellor, who subsequently passed a declaratory decree from which the Comptroller of the State appealed. In holding that a suit will not lie under the Uniform Declaratory Judgments Act to have the tax status of a taxpayer determined, the Court of Appeals stated:

“The same Legislature which enacted Chapter 294 also enacted Chapter 277. A consideration of the enactment last mentioned shows the elaborate and specific provisions set up for the trial of issues arising under the income tax statute. In the first instance the Comptroller is required to examine and audit the returns of taxables and compute the taxes due by them, and if such computation requires it, he must make an assessment and mail notice thereof to the taxable, who if dissatisfied is given an appeal to the State Tax Commission, which is expressly required to review the assessment on the law and the facts. If dissatisfied with the decision of the State Tax Commission the taxpayer may from its findings appeal to the circuit court, and from that court a further appeal is given to this court. It thus appears that the Legislature has in detail specifically designated the manner in which the determination of the amount of income taxes due shall be made. It therefore appears that the special statutory remedy given by Chapter

277 of the Acts of 1939 is exclusive of the general statutory remedy provided by Chapter 294. It would seem most unlikely that the Legislature would have so elaborately provided this special statutory remedy and by enacting Chapter 294 have intended to enable the taxpayer at his mere whim to impose the duties of administrative officers upon the courts.

"Jurisdiction must exist in the present case, if at all, by virtue of the provisions of Chapter 294, but since the Legislature at the same session has given specific jurisdiction first to the Comptroller, next to the State Tax Commission and successive appeals both to circuit courts and this court, this of itself is, in our judgment, sufficient to show that it did not intend by the enactment of Chapter 294 to confer jurisdiction in situations of this character. The Legislature has pointed out definitely certain tribunals and conferred upon them authority to decide the matter, and this being true, it must be held that the Chancellor erred in concluding that under the allegations of the bill of complaint jurisdiction existed under the Declaratory Judgments Act.

"We do not understand that this view is controverted even by those regarded as leading proponents of the uniform Act, for as Professor Borchard, who is regarded as an authority on the subject, points out in his work, 'Where, however, a special statutory method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration'.

"See also Anderson on Declaratory Judgments, Section 43, page 127, where it is stated: 'Declaratory Judgments have generally been refused in the following cases: (1) Where it would serve no useful purpose, (2) Where a special tribunal has been provided to handle specified controversies and a declaration of rights is sought as to matters falling within such specifications; * * *'."

In Borchard, Declaratory Judgments, the rule is stated as follows (pp. 156, 157):

"Where, however, a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose. * * *."

In addition to the cases cited by Borchard, page 156, Note 30, see:

Collier Advertising Service v. New York, supra;
Lisbon Village Dist. v. Lisbon, supra;
Commercial Credit Company v. Martin, supra;
Ottawa Y. M. C. A. v. Ottawa, supra.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the District Court erred in overruling the District's motion to dismiss the complaint and petition for declaratory judgment and that the order of said Court should be reversed.

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APPENDIX

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DOCKET ENTRIES

DATE	PROCEEDINGS
1941	
Dec. 26	Complaint filed
1942	
Jan. 15	Motion to Dismiss Petition of defendants for Declaratory Judgment
Feb. 12	Order overruling motion to dismiss
Feb. 16	Notice of intention to appeal for special appeal
Feb. 20	Answer of defendant
Mar. 19	Calendared
Apr. 17	Designation of record of defendant Defendants' statement of points Copy of order from Court of Appeals for D. C. allowing special appeal.

COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

1. This complaint is brought under the provisions of the Federal Declaratory Judgments Act of June 14, 1934 (48 Stat. 955) as amended, for the purpose of determining whether the real estate, owned by plaintiff in the District of Columbia, is used in an educational use within the meaning of Sec. 713 of Title 20 of the Code of Laws for the District of Columbia, and so exempt from taxation.

2. Plaintiff is a non-stock, non-profit sharing corporation duly created and existing under the laws of the District of Columbia. In its Articles of incorporation it is stated:

"Its aim shall be to unite educated and reputable

Pharmacists and Druggists of America in the following objects:

"1. To improve and regulate the drug market by preventing the importation of inferior, adulterated, or deteriorated drugs and by detecting and exposing home adulterations.

"2. To encourage such proper relations among Pharmacists, Druggists, Physicians and the people at large, as may promote the public welfare, and tend to mutual strength and advantage.

"3. To improve the science and art of Pharmacy by diffusing scientific knowledge among Pharmacists and Druggists, fostering pharmaceutical literature, developing talent, stimulating discovery and invention, encouraging home production and manufacture in the several departments of the drug business.

"4. To regulate the system of apprenticeship and employment so as to prevent, as far as practicable, the evils flowing from deficient training in the responsible duties of preparing, dispensing and selling medicines.

"5. To suppress empiricism, and to restrict the dispensing and sale of medicines to regularly educated Pharmacists and Druggists.

"6. To uphold standards of authority in the education, Theory and Practice of Pharmacy.

"7. To create and maintain a standard of professional honesty equal to the amount of our professional knowledge with a view to the highest good and greatest protection to the public."

In pursuance of these objects plaintiff has for many years supervised and revised the American Pharmacopoeia. After conducting research into the standards of drugs and medicines not included in the Pharmacopoeia, it established and maintains the National Formulary for the instruction and information of Pharmacists, Druggists, Physicians and such of the general public as might be interested; it has obtained and supplied information to the Government of the United States in connection with the pure food and drug laws and other acts affecting the public health; it maintains a research laboratory

where studies are made regarding new drugs and medicines and the results made known to those interested; it maintains fellowships for the study of drugs and medicines and their properties and the development of new formulas; it maintains a reference library and a historical museum which are open to all interested and which are frequently consulted by agencies of the Government; through an appropriate committee it issues and revises a syllabus containing an outline of the minimum instruction in pharmacy for the guidance of colleges teaching pharmacy and of examining boards; it is now, at the request of interested persons compiling a brochure dealing with the newer drugs for use in schools of nursing; it maintains a monthly publication for the purpose of informing those interested of new developments in the field of Pharmacy, and important regulations and decisions in the food and drug field are published and disseminated to its members; it has prepared a model Pharmacy Act for the information and guidance of persons interested in such legislation.

3. In 1928 plaintiff purchased certain real property in Square 62 in the District of Columbia for the purpose of erecting thereon a building for its own use. In 1939, at the urgent solicitation of the National Capital Park and Planning Commission and the Commission on Fine Arts to conform to plans of said Commissions for the development of B Street (now Constitution Avenue) to provide a suitable "frame of the Lincoln Memorial", and in order to provide a proper setting for a building to be used for "its professional and educational work", plaintiff at an expense of over \$300,000 purchased additional property in Square 62. The property acquired in 1928 and 1929 as above set out consists of Lots 3, 4, 5, 16, 17, 801, 802, 804, 806 and 807 in said square.

Upon that property plaintiff has erected a building approved by the Commissions above mentioned, in which it maintains its headquarters. Here the Association maintains its library, its research laboratory, where it carries on the work of improving the United States Pharmacopoeia and the National Formulary, and its museum. Here, also, the work of prepar-

ing and distributing courses of study for schools of pharmacy, information and instruction for members as to new regulations and decisions affecting their work, is carried on, and the monthly publication of the Association is edited and distributed.

4. Under date of March 20, 1933, plaintiff applied to the Commissioners of the District of Columbia for exemption of its property from taxation. Its application was supported by the Commission of Fine Arts on the ground that the plaintiff Association was "organized and operated exclusively for scientific and educational purposes". And under date of May 10, 1935, plaintiff was advised by the Secretary to the Board of Commissioners that its property, as described in paragraph 3 hereof, would be exempted from general taxes as of January 1, 1934, and such exemption should continue "as long as said property is used for its present purposes; provided, that all taxes, interest, etc., against said property be paid to the date exemption is allowed". Payment of the "taxes, interest, etc." was duly made, and plaintiff's said property was thereafter held to be exempt from general taxation.

5. There has been no change in the use of plaintiff's said property but under date of February 10, 1941, plaintiff was notified by the Secretary of the Board of Commissioners of the District of Columbia that the Commissioners had considered plaintiff's said property and reached the conclusion that this property is not legally exempt from taxation under existing law and that the Assessor would be directed to restore plaintiff's said property to a taxable status at the expiration of sixty days from the date of the said notice.

6. Plaintiff duly protested to the Commissioners of the District against the ruling above set out and the placing of its property upon a tax status.

7. Under date of November 12, 1941, the Secretary of the Board of Commissioners notified the plaintiff's attorneys that the Commissioners have reaffirmed their action on February 7, 1941, directing the return of this property to a taxable status, for the reason that it "is not used for educational pur-

poses within the clear intent and meaning of Section 713, Title 20, D. C. Code."

8. On December 16, 1941, plaintiff received from the Assessor of the District of Columbia bills for taxes on its said property for a period beginning with April 11, 1941, and extending to and including June 30, 1942, in the total sum of Nine Thousand, Five Hundred Ninety-eight Dollars and Fourteen Cents (\$9,598.14).

9. Plaintiff asserts that its said property is used for educational purposes and accordingly that the said assessment is illegal, its said property being exempt from taxation under the provisions of Section 713, Title 20 of the Code of Laws for the District of Columbia.

9. Under the circumstances above narrated, plaintiff is advised that an actual controversy of a justiciable nature has arisen which makes it proper to present to this Honorable Court the plaintiff's grievances for the declaration of its "rights and other legal relations" with respect to the subject matter herein involved.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT:

1. Declaring that its property hereinabove described is "used for educational purposes" and is exempt from taxation under the provisions of Section 713, Title 20 of the Code of Laws for the District of Columbia.

2. That the defendants be enjoined and restrained from assessing or collecting taxes against the said property of plaintiff.

3. Awarding plaintiff such other and further relief as this Court may determine to be appropriate in the premises.

AMERICAN PHARMACEUTICAL ASSOCIATION

By—E. F. KELLY,
Secretary

CLEPHANE, LATIMER & HALL,
By GILBERT L. HALL,

Attorneys for Plaintiff,
843 Investment Building.

I, E. F. Kelly, being first duly sworn, depose and say that I have read the foregoing and attached complaint and petition by me subscribed and know the contents thereof; that I am the Secretary of the American Pharmaceutical Association, the corporation named as plaintiff therein, and duly authorized to sign said complaint on its behalf; and that I verily believe the matters and things therein stated to be true.

(S) E. F. KELLY

MOTION TO DISMISS THE COMPLAINT AND PETI-
TION FOR DECLARATORY JUDGMENT

Defendants, by their attorneys, respectfully move the Court to dismiss the action because the Complaint fails to state a claim against defendants upon which relief can be granted.

(S) RICHMOND B. KEECH
Corporation Counsel, D. C.

(S) GLENN SIMMON
Assistant Corporation Counsel, D. C.
Attorneys for Defendants.

ORDER

Upon consideration of the motion to dismiss the complaint and argument of counsel, it is by the Court this 12th day of February, 1942,

ORDERED that said motion be and it hereby is overruled.

(S) JENNINGS BAILEY
Justice

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8199

THE DISTRICT OF COLUMBIA and
J. RUSSELL YOUNG, GUY MASON, CHARLES W. KUTZ,
Commissioners of the District of Columbia,
Appellants,

v.

AMERICAN PHARMACEUTICAL ASSOCIATION, *Appellee.*

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Attorneys for Appellee,
843 Investment Building.

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IN THE
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No. 8199

THE DISTRICT OF COLUMBIA and
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Commissioners of the District of Columbia,
Appellants,

v.

AMERICAN PHARMACEUTICAL ASSOCIATION, *Appellee.*

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

The American Pharmaceutical Association is a non-stock, non-profit corporation. It owns real estate in the District of Columbia which was, by action of the then Board of Commissioners of the District of Columbia exempted from general taxes as of January 1, 1934, and the Association was advised that such exemption should continue "as long as said property is used for its present purposes". No change has been made in the use of the said property nor in the applic-

able statute but under date of February 10, 1941, appellee was notified by the Secretary of the Board of Commissioners that the Commissioners had considered the appellee's property and reached the conclusion that it was not legally exempt under existing law and the Assessor would be directed to restore appellee's said property to a taxable status at the expiration of sixty days from the date of the notice. Appellee duly protested to the said Commissioners but under date of November 12, 1941, it was notified that the Commissioners had reaffirmed their action of February, 1941, directing the return of the property to a taxable status for the reason that the said property "is not used for educational purposes within the clear intent and meaning of Section 713, title 20, District of Columbia Code".

Appellee has received from the Assessor of the District of Columbia bills for taxes in the total sum of \$9,598.14.

Appellee filed in the United States District Court for the District of Columbia a complaint and petition against appellants demanding a declaratory judgment that the property of appellee is used for educational purposes and also asking that the appellants be enjoined and restrained from assessing or collecting taxes against the said property. (See Appendix, Applts' Brief.) A motion to dismiss the complaint was filed on behalf of the appellants and, after hearing, was overruled. This Court granted a special appeal. No contention was made by appellee below and none is being made here, that it is entitled to an injunction. Hence that prayer of the complaint is to be treated as abandoned.

SUMMARY OF ARGUMENT.

- I. There is no statutory remedy available to appellee.
- II. The existence of other adequate remedy does not preclude a Declaratory Judgment.
- III. The statutory prohibition against injunctions in tax cases does not preclude Declaratory Judgments.

ARGUMENT.

I. No Statutory Remedy Available to Appellee.

It is conceded that if a special statutory remedy to review the action complained of had been available to appellee under the situation presented in this case, that remedy would have to be pursued. Appellants contend such remedy is provided by Section 47-712, District of Columbia Code, 1940, which reads in part as follows:

“If the Board of Assistant Assessors shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment was void, it shall be their duty at once to reassess such property * * *

and by Section 47-2405, reading in part:

“Any person aggrieved by any reassessment made in pursuance of Section 47-712 may within ninety days after notice of said reassessment appeal * * *

Such appeal is to the Board of Tax Appeals, the tax assessed having first been paid.

Nowhere in the record of this case does it appear that the Board of Assistant Assessors has assessed or reassessed appellee's property. Nor, indeed, that said matter was ever presented to, heard or considered by said Board or that it at any time took any action with respect thereto. On the contrary, it is alleged in the complaint and stated in appellants' "Statement of the Case" that the Commissioners of the District of Columbia acting upon their own responsibility directed the Assessor of the District of Columbia to restore appellee's property to a taxable status. No statute has been cited by appellants, and none is to be found, which confer upon the Board of Tax Appeals or upon any administrative body, jurisdiction to review the action taken by the District Commissioners in the present case. It is apparent therefore that the cases of *Washington Term. Co. v. Boswell*, — App. D. C. —, 124 F. (2d) 235; *Sykes v. The Jen-*

nie Wren Co., 64 App. D. C. 379, 73 F. (2d) 729, and *Black River Valley Broadcasts v. McNinch*, 69 App. D. C. 311, 101 F. (2d) 235, cited by appellants for the proposition that "A statutory remedy providing for appeal is exclusive" have no bearing on the instant case.

It is apparent from the foregoing that there is no statutory remedy providing for an appeal from the action which the Commissioners of the District of Columbia took in this case.

II. The Existence of Other Adequate Remedy Does Not Preclude a Declaratory Judgment.

Assuming that appellee could have paid the tax and sued at law to recover it, the existence of such remedy would not deprive it of the right to proceed under the declaratory judgment statute. Appellants cite the case of *Williams v. Tawes*, — Md. —, 17 Atl. (2) 137, and say it is directly in point. That case is an interpretation of a State statute by a State Court which had in *Caroline Street Permanent Building Association No. 1 v. Sohn*. — Md. —, 13 Atl. (2) 616, taken the narrow view that "where there exists an immediate cause of action between the parties for which one of the common remedies of law or equity is adequate and available a proceeding for a declaratory judgment is not appropriate within the contemplation of the Act" (p. 620). This view is utterly inconsistent with the Federal Declaratory Judgments Act which expressly provides for a declaration "whether or not further relief is or could be prayed" (28 U. S. C. A. 400). It is also opposed to Rule 57 of the Rules of Civil Procedure which provides:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

It has many times been held that relief may be given under the Declaratory Judgments Act notwithstanding other adequate relief exists. Thus in *Actna Casualty & Surety*

Co. v. Yeatts, 99 Fed. (2) 665, Judge Soper of the Fourth Circuit, said, at page 669:

“It is no answer to a suit for a declaratory judgment that the plaintiff may have an adequate remedy elsewhere.”

And Judge Parker, speaking for the same Court in the case of *Stephenson v. Equitable Life Assurance Society*, 92 Fed. (2) 406, said, at page 408:

“The fundamental error of the court below consists in assuming that a proceeding for a declaratory judgment may not be maintained where another remedy is available. There is nothing in the act which limits its application to suits in equity or which suggests that the availability of other remedies shall preclude its use. On the contrary, the provision in the first paragraph for pleading by ‘declaration’, as well as by complaint or petition, and the provision in the third paragraph for jury trial show clearly that declaratory judgments in legal as well as equitable proceedings were contemplated; and that the remedy provided was intended as an alternative one in cases where other remedies are available is shown by the provision of the first paragraph that such judgments may be rendered ‘whether or not further relief is or could be prayed’.”

It is therefore unnecessary to discuss the cases cited in appellants’ brief (p. 9) to the effect that the taxpayer is not entitled to invoke the declaratory judgments statute where he has another adequate remedy.

There is therefore no obstacle to prevent the Court from making a declaration of the use which is made of appellee’s property.

III. The Statutory Prohibition Against Injunctions in Tax Cases Does Not Preclude Declaratory Judgments.

It is contended by the appellants that Section 47-2410 District of Columbia Code, 1940, providing

“No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax”

precludes the granting of declaratory relief by way of declaring the use made of appellee's property. This contention fails to take into consideration the language of the Declaratory Judgments Act, *supra*, which provides:

"In cases of actual controversy *except with respect to Federal Taxes* the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." (Italics supplied)

It is appropriate to consider the history of the legislation with reference to the Declaratory Judgments Act, the subsequent Johnson Act (*infra*) and Section 47-2410 of the District of Columbia Code above set forth. As originally enacted, the Declaratory Judgments Act contained no prohibition against its use in any tax controversy (48 Stat. 955). Following its enactment frequent resort was had to it in cases involving both State and Federal taxes. (See *Morrison-Knudsen Co., Inc. v. State Board of Equalization of Wyoming*, 35 Fed. Supp. 553, and quotation therefrom in note to Sec. 400, Title 28, U. S. Code Annotated). In 1935 Congress amended the original Act by inserting the words "except with respect to Federal taxes," (49 Stat. 1027) thus leaving jurisdiction with the courts to give complete relief as to State taxes.

In 1937, with further experience under the Declaratory Judgments Act before it, Congress enacted the Johnson Act, 50 Stat. 738, Title 28, Sec. 41 (1) U. S. Code Annotated, which provided that no District Court should have jurisdiction

"to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."

Still later Congress passed Sec. 47-2410, District of Columbia Code, 1940, providing:

“No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents or employees of any tax.”

From the foregoing history it is perfectly plain that Congress had no intention of taking away from the Federal Courts the jurisdiction to give relief by way of declaratory judgment in tax matters except with respect to Federal taxes and to deny the power which some courts had exercised in support of their declaratory judgment. Had Congress desired to abolish the right to a declaratory judgment in all tax cases it could have done so by the simple expedient of omitting the word “Federal” in the amendment first made. It thus appears that three times after the passage of the original Act Congress had that opportunity and from the fact that it did not do so, it is to be assumed that it did not intend to so limit the scope of jurisdiction in declaratory judgment proceedings.

But appellants say that a declaration that appellee’s property is used for educational purposes is equivalent to an injunction and so is prohibited by the statutes above quoted. In support of that position they cite the case of *Collier Advertising Service v. The City of New York*, 32 Fed. Supp. 870. That case was discussed in the opinion in *Morrison-Knudsen v. State Board of Equalization of Wyoming, supra*, and the Court said at p. 555:

“It is true that counsel for defendants cite a case, *Collier Advertising Service v. City of New York*, D. C., 32 F. Supp. 870, in which the judge expressed the view that the Johnson Act should be read into the Declaratory Judgment statute because otherwise the practical effect would be to nullify the Johnson Act. However, I know of no rule of statutory construction which would justify such a conclusion. When statutes are clear and unambiguous they must be construed as they read, and as has been so repeatedly said by the courts, that any other theory of construction would be legislation by the

courts and outside their province. The conclusion is reached that the Johnson Act cannot be held to apply in its provisions to the Declaratory Judgment Act."

The view of the Court in the *Collier Advertising case*, *supra*, is not in accord with *Nashville C. & St. L. Railway v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, in which, at page 262, then Justice Stone, speaking for the court, said:

"the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax.

"While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."

Chief Justice Hughes in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 81 L. Ed. 617, also said that where there is

"a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages" (p. 241).

It will be noted that the prohibition contained in the Johnson Act and the prohibition contained in the section of the District of Columbia Code above set forth as to the issuance of injunctions are substantially the same. Whether after the passage of the Johnson Act relief could be given under the Federal Declaratory Judgments Act against a State tax assessment was the question before the District Court of the United States for the District of Wyoming in

1940 in the case of *Morrison-Knudsen Co. v. State Board of Equalization of Wyoming*, *supra*. In discussing this question the court said, at p. 555:

"The defendants now contend that this amendment must be read into and become a part of the Federal Declaratory Judgments Act so as to deny the jurisdiction of the Federal Courts in causes seeking to have determined the constitutionality of State taxing statutes. I have been unable to bring myself to the conclusion that this view conforms to approved statutory construction. The history of the legislation points to the contrary. When the amendment of 1935 to the Declaratory Judgments Act became a law the history in the courts was before the Congress that the Act had been invoked in State taxing statutes and yet Congress saw fit to include a prohibition with respect to Federal taxes only. Again, in 1937 with the same history before the Congress in connection with the amendment to the General jurisdiction of the district courts over State taxing matters, it evidently saw no reason to include any prohibition against the use of the Declaratory Judgments Act, but limited the jurisdiction by injunction of those courts to cases in which there was no plain, speedy and efficient remedy at law or in equity in the State courts. As it appears to me, these two incidents make it plain that Congress did not desire or intend to change or limit the jurisdiction of the Federal courts under the Declaratory Judgments Act in regard to State taxing statutes or the law in the one place or the other would have been so written * * *. The conclusion is reached that the Johnson Act cannot be held to apply in its provisions to the Declaratory Judgments Act, and the court has therefore arrived at the point where this court decides that it has jurisdiction of the suit under the Declaratory Judgments Act and that it is both the Court's right and duty to consider and rule upon the constitutionality of the challenged State statutes."

With the view taken in the cases above referred to that the right to declaratory judgment has no relation to the question as to injunction, Professor Borchard in his work on Declaratory Judgments agrees. In discussing declarations in respect to tax cases he says, p. 558:

"The unconstitutionality or invalidity of a tax law subjecting the plaintiff to taxation has been challengeable in the United States by a suit for the recovery of a tax already paid, and in some states by injunction. Yet in many states it is not possible to enjoin the collection of a tax, because public policy opposes restraint upon the fiscal powers of the government, the effect of which might be to cripple the exercise of public functions. The exceptions are carefully guarded. Still it ought to be possible, without undue delay or hampering of the government, to challenge the validity of a tax law or tax assessment thereunder without abusing the injunction for the purpose, and yet without going to the trouble and expense of paying the tax and then suing for its recovery. The delay and uncertainty as to the validity of the tax collection are not materially diminished by the fact that the Government has the tax money in its Treasury. What is needed is a speedy decision on the issue of legality, and this is afforded by the declaration."

Appellants' Other Authorities.

It remains to discuss briefly the other authorities cited by the appellants.

Burgdorf v. D. C., 7 App. D. C. 405; *U. S. Trust Co. v. D. C.*, 48 App. D. C. 610; and *Maryland and Virginia Milk Producers Association, Inc., v. Hazen*, 66 App. D. C. 136, 85 Fed. (2) 302, are cited for the proposition that in the absence of statutory provision the courts in this jurisdiction have refused to enjoin the collection of taxes levied by the District. It is sufficient to note that those cases have no application to the instant case as appellee, as before stated, has abandoned the prayer for injunction.

Appellants cite the case of *Utah Fuel Co. v. Bituminous Coal Commission*, 59 App. D. C. 33, 101 Fed. (2) 426. Neither that case nor *Bradley Lumber Co. v. National Labor Relations Board*, 84 Fed. (2) 97, also cited by appellants, are in point here because in the former the Court held that the order of the Commission upon which a declaratory judgment was sought was preliminary and procedural and so not subject to review, and also that exclusive jurisdiction to

review the orders of the Commission was vested in this Court and the Circuit Courts of Appeals and not in the District Court, and in the latter case it was held that the controversy had not reached a judicial stage. In the present case there is "an actual controversy" as to the use made of appellee's property and that controversy has reached the judicial stage.

In *Wash. Term. Co. v. Boswell*, — App. D. C. —, 124 Fed. (2) 235, from which appellants quote in support of their position, a dispute had been submitted to the National Labor Relations Board which made an award favorable to the employees. The statute provided that the employees might bring a suit in the District Courts to enforce the award, within two years after the award had been made. During this two-year period the Terminal Company filed an action for a declaratory judgment as to the same controversy upon which the award had been made. This Court found that the Terminal Company had not joined certain necessary parties and "consequently, a decision in favor of the defendants could not relieve the plaintiff from its dilemma" (p. 248) and that "the action was premature" (p. 251) and with this in mind and "limiting the decision therefore squarely to the facts and the issues which they present" (p. 252) the Court used the language quoted from its opinion.

Appellee contends therefore, based upon the statutes and authorities above cited, that it is entitled to the declaratory judgment prayed and that therefore the ruling of the District Court overruling the motion to dismiss the complaint should be affirmed.

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